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Rocky Mountain High: The Impact of Federal Guidance to Banks on the Marijuana Industry

I. INTRODUCTION

A range of disparate viewpoints exists concerning the efficacy, necessity and ethicality of the criminalization of marijuana in the United States. Twenty-three states and the District of Columbia have legalized the use of marijuana to some extent.¹ Under federal law, the Controlled Substances Act (“CSA”) prohibits the manufacturing, distribution or dispensing of marijuana.² Despite the CSA, figures in popular media increasingly admit to and even boast about their “medical use” (frequently treated as a political fiction) or recreational use of the substance.³ With a majority of Americans now supporting legalization,⁴ the end to marijuana prohibition could become reality. Despite federal law to the contrary, the states that have decriminalized or legalized marijuana continue to see enormous growth in state-sanctioned marijuana-businesses.⁵ These budding markets have contributed huge revenues to the state coffers.⁶ However, until federal legislation steps in to build a uniform regulatory structure concerning its use and distribution, several sizeable hurdles remain for those businesses that are legally permitted at the state level to trade grass for cash. One of the

1. *Medical Marijuana Pros and Cons*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last visited Oct. 5, 2014).

2. Controlled Substances Act, 21 U.S.C. § 841(a)(1) (2012).

3. *2013 Top 50 Most Influential Marijuana Users*, MARIJUANA POL’Y PROJECT, <http://www.mpp.org/outreach/top-50-marijuana-users-list.html> (last visited Oct. 5, 2014).

4. Art Swift, *For the First Time, Americans Favor Legalizing Marijuana*, GALLUP (Oct. 22, 2013), <http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx>.

5. Bill Briggs, *Pot Legalizations Push U.S. Toward Weed Business Boom*, NBC NEWS (Nov. 8, 2014), <http://www.nbcnews.com/storyline/legal-pot/pot-legalizations-push-u-s-closer-weed-business-boom-n243861>.

6. Patrick Johnsson, *How Legal Marijuana is Reshaping State Economies*, CHRISTIAN SCI. MONITOR, (Nov. 7, 2014), <http://www.csmonitor.com/USA/Society/2014/1107/How-legal-marijuana-is-reshaping-state-economies-video>; Aaron Smith, *Colorado Stash: \$184m in Marijuana Taxes*, CNN MONEY (Feb. 20, 2014, 2:25 PM), <http://money.cnn.com/2014/02/20/news/economy/marijuana-taxes-colorado/>.

most exigent of these hurdles is just that: cash. Financial institutions are reluctant to deal with marijuana-related businesses because of the risk of prosecution under the Bank Secrecy Act (“BSA”).⁷ Recent guidance by the Financial Crimes Enforcement Network (“FinCEN”)⁸ and the Department of Justice (“DOJ”) provides little relief from these risks.⁹

This Note considers the implications of these recent federal guidelines issued to financial institutions with respect to their freedom to do business with the state-sanctioned marijuana industry. It also discusses whether viable legal alternatives might be available to allow growth in the burgeoning marijuana markets while still remaining faithful to the federal government’s position regarding marijuana as a dangerous drug worthy of prohibition. This Note attempts to balance competing economic and governmental interests in an emerging industry that continues to evolve amid a tumultuous national landscape. This Note argues that current guidelines are excessively onerous for financial institutions and without greater flexibility, state-sanctioned marijuana businesses will not have access to vital financial services.¹⁰ Furthermore, without some change in the existing structure, the problems associated with all-cash businesses will continue for marijuana businesses operating legally under state law.¹¹ The exclusion of valuable tax revenue from government coffers and investment capital

7. Currency and Foreign Transactions Reporting Act of 1970 (Bank Secrecy Act), Pub. L. No. 91-508, § 202, 84 Stat. 1118, 1118 (codified as amended at 31 U.S.C. § 5311 (2012)) (requiring banks and financial institutions to facilitate the detection and prevention of money laundering); Reginald J. Brown et al., *New Guidance on Financial Services and Marijuana-Related Businesses*, WILMER HALE (Feb. 20, 2014), <http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=107374234> 14.

8. “FinCEN is a bureau of the United States Department of the Treasury. FinCEN’s mission is to safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities.” *What We Do*, FINCEN.GOV (Feb. 6, 2015), http://www.fincen.gov/about_fincen/wwd/.

9. FIN. CRIMES ENFORCEMENT NETWORK, U.S. DEP’T OF THE TREASURY, GUIDANCE: BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (Feb. 14, 2014), available at http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf [hereinafter FINCEN GUIDANCE].

10. See *infra* Parts III & IV.

11. See John B. Stephens, *Pot Shops Shunned By Banks Haul in the Cash*, USA TODAY (Aug. 31, 2014), <http://www.usatoday.com/story/money/business/2014/08/31/pot-marijuana-industry/13628491/>. Jennifer Waller, a Colorado Bankers Association senior vice president, explains that the FinCEN guidance “just set up this compliance scheme that’s impossible to follow and reiterated that you could still be prosecuted even if you’re doing everything under the memo” *Id.*

from the marketplace these businesses generate will also persist.¹²

This Note proceeds in five parts. Part II provides a brief background on the recently issued FinCEN guidance concerning provision of banking services to marijuana businesses.¹³ Part III explains that the onus the guidance places on the banks essentially make the formation of business relationships with marijuana businesses impracticable.¹⁴ Part IV specifically discusses the requirement for “suspicious activity reports” and the process that is involved in submitting them to remain in compliance with FinCEN’s guidelines.¹⁵ Part V contemplates the problems inherent in “all cash” businesses—the structure to which the state-legalized marijuana industry is relegated—and how states have attempted to reduce some of these hazards in the absence of large-scale offerings of financial services from depository institutions.¹⁶ Finally, Part VI concludes with some possible legislative solutions.¹⁷

II. BACKGROUND

Under the current federal regulatory scheme, marijuana qualifies as a Schedule I substance with “no currently accepted medical use” and a “high potential for abuse.”¹⁸ The conflict between state and federal law on the subject represents a seemingly intractable federalism problem in states where marijuana is legal.¹⁹ The official position of the federal government conflicts with its willingness and ability to deploy

12. See Jacob Sullum, *Marijuana Money Is Still a Pot of Trouble for Banks*, FORBES (Sept. 18, 2014), available at <http://www.forbes.com/sites/jacobsullum/2014/09/18/local-banks-terrified-by-friendly-neighborhood-marijuana-merchants/> (explaining that the IRS suggested, in a recent tax dispute, that marijuana businesses could pay taxes in cash through indirect electronic methods—methods that may still qualify as moneylaundering).

13. See FINCEN GUIDANCE, *supra* note 9; see also *infra*, Part II.

14. See *infra*, Part III.

15. Memorandum from James M. Cole, Deputy Att’y Gen., to U.S. Att’ys (Aug. 29, 2013) [hereinafter Cole Memo], available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (guidance regarding marijuana enforcement); see *infra* Part IV.

16. Keith Coffman, *Colorado Lawmakers OK Co-Op Banking Option for Marijuana Sellers*, REUTERS (May 8, 2014), <http://www.reuters.com/article/2014/05/08/us-usa-marijuana-colorado-idUSBREA3M27X20140508>; see *infra* Part V.

17. See *infra* Part VI.

18. DRUG ENFORCEMENT ADMIN., DRUG SCHEDULES (2014), available at <http://www.dea.gov/druginfo/ds.shtml>.

19. See Robert A. Mikos, *Marijuana at the Crossroads: Article: Medical Marijuana and the Political Safeguards of Federalism*, 89 DENV. U. L. REV. 997 (2012).

resources to enforce the prohibition of marijuana in states where it has been legalized.²⁰ The federal government must allocate its resources for enforcement and prosecution under federal law to the most pressing cases.²¹ While the federal ban on marijuana might prove to have bite in individual cases, overall, it has proven “largely toothless” in curtailing state regulations that contradict it.²² While direct regulation has not proven to impede the progress of the state-sanctioned marijuana businesses, indirect regulation is now proving effective.²³ Specifically, indirect regulation restricting access to banking presents a significant burden for marijuana business owners.²⁴ The most pressing problem in the day-to-day lives of marijuana business owners is what to do with the money.²⁵ Without a uniform structure to rely on, banks have been more than a little reluctant to provide financial services to marijuana businesses for fear of federal prosecution.²⁶

Until banks make a move toward opening their doors to marijuana distributors and vendors, these entrepreneurs will be left to manage large quantities of cash while also running businesses that were, until very recently, criminal.²⁷ Without a secure means to store and make use of their income, proprietors of marijuana businesses remain vulnerable to criminal threats.²⁸ Without access to the banking and financial system, the cash produced from the state-sanctioned marijuana industry is unproductive, when it could be made to work for the good of the economy at large if deposited into our financial system. Cash is difficult to track, it earns no interest, it is problematic to invest, and it is exceedingly difficult to accurately tax.²⁹

Thus, the current state of affairs is a conflict between federal and state law. The federal prohibition is rarely enforced against

20. *Id.*

21. *Id.* at 1003.

22. *Id.* at 998.

23. Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RES. L. REV. 44 (forthcoming 2015) (manuscript at 2).

24. *Id.*

25. See Stephens, *supra* note 11.

26. *Id.*

27. *Id.*

28. *Id.*

29. Matt Ferner, *House Votes to Allow Banking Access for Marijuana Businesses*, HUFFINGTON POST (July 16, 2014, 5:15 PM), http://www.huffingtonpost.com/2014/07/16/house-marijuana-banking_n_5592620.html.

individuals that follow contradictory state law.³⁰ In the midst of under-enforcement, the federal government chooses to regulate the state-sanctioned businesses indirectly through their access to financial services.³¹ To soften the edges of these contradictions, however, the federal government has indicated that it has certain priorities under the CSA that it emphasizes for prosecution.³²

On August 29, 2013, the Department of Justice issued guidance to U.S. Attorneys (the “Cole Memo”) to use their enforcement resources to prosecute marijuana violations of the CSA only when the conduct interferes with one of the priorities identified.³³ Deputy Attorney General Cole issued “Guidance Regarding Marijuana Related Financial Crimes,” on February 14, 2014.³⁴ The Deputy Attorney General reiterated the Cole Memo Priorities and stated that in determining whether to charge individuals or institutions with violations of the money laundering statutes, the unlicensed money remitter statute, and the BSA based on marijuana-related violations of the CSA, prosecutors should also apply the Cole Memo Priorities.³⁵ The same day, FinCEN issued its own guidance detailing the prioritization of prosecutions of offenses violating relevant federal banking law.³⁶

While these efforts were intended to calm the banking system’s anxiety over developing relationships with marijuana-related businesses in those states with legalized marijuana, none of this guidance provided comfort to financial institutions in dealing with the newly-legalized businesses.³⁷ Larger banks are unwilling to expose themselves to the risks attached to the marijuana business despite federal assurances that they will avoid prosecution if they comply with the relevant guidelines.³⁸ Smaller banks, while on the whole adopting a similar stance to their larger counterparts, will occasionally form working relationships with marijuana businesses in accordance with the

30. Hill, *supra* note 23, at 2.

31. *Id.*

32. See Cole Memo, *supra* note 14, at 1.

33. *Id.*; see *infra* Part III.

34. Cole Memo, *supra* note 14, at 1.

35. Cole Memo, *supra* note 14, at 4.

36. See FINCEN GUIDANCE, *supra* note 9.

37. Serge F. Kovalski, *U.S. Issues Marijuana Guidelines for Banks*, N.Y. TIMES (Feb. 14, 2014), http://www.nytimes.com/2014/02/15/us/us-issues-marijuana-guidelines-for-banks.html?_r=0.

38. *Id.*

procedures set out by FinCEN.³⁹ However, these relationships may result in the larger banks becoming exposed to the risks associated with marijuana businesses through their relationships with these smaller institutions.⁴⁰ To increase the banks' comfort level with forming relationships with marijuana businesses, there is a need for greater clarity and a regulatory structure that all financial institutions can make workable.⁴¹ The current guidelines do not provide the assurances or comprehensive procedures that practically all banks view as a necessary prerequisite to doing business with the marijuana industry.⁴²

III. "MORE WHAT YOU'D CALL GUIDELINES THAN ACTUAL RULES"

In Disney's 2003 film *Pirates of the Caribbean: The Curse of the Black Pearl*, one of the most famous scenes contains an exchange between Elizabeth Swann, an English aristocrat, and Hector Barbossa, captain of a cursed pirating vessel, the eponymous "Black Pearl."⁴³ Swann negotiates with the pirates, led by Barbossa, who are in the process of laying siege to the city of Port Royal, over which Swann's father is governor.⁴⁴ As they make preparations to leave, Swann demands to be returned to the shore and attempts to invoke the "Pirate Code" to support her demand.⁴⁵ Barbossa turns on her and replies, "First, your return to shore was not a part of our negotiations, nor our agreement, so I must do nothing. And secondly, you must be a pirate for the pirate code to apply, and you're not. And thirdly, the Code is more what you'd call 'guidelines' than actual rules. Welcome aboard

39. See Danielle Douglas, *Banks Are Slowly Welcoming Legal Marijuana Dealers*, WASH. POST (Aug. 12, 2014), http://www.washingtonpost.com/business/economy/banks-are-slowly-welcoming-legal-marijuana-dealers/2014/08/12/01c17960-225b-11e4-8593-da634b334390_story.html (explaining that, at the time this article was written, 105 banks had established relationships with marijuana-related businesses).

40. Brett Wolf, *Big U.S. Banks Seek New Clarity on Risks of Marijuana-Linked Accounts*, REUTERS (Aug. 28, 2014), <http://www.reuters.com/article/2014/08/28/us-banks-moneylaundering-drugs-idUSKBN0GS2QB20140828>.

41. See Travis Nelson, *Banks Are Dazed and Confused After Marijuana Guidance*, LAW360 (Mar. 3, 2014), <http://www.law360.com/articles/514588/banks-are-dazed-and-confused-after-marijuana-guidance>.

42. Kovaleski, *supra* note 37.

43. PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures 2003).

44. *Id.*

45. *Id.*

the Black Pearl”⁴⁶

The same scenario faces the banking institutions from FinCEN’s “guidance” issued in 2014 for the provision of financial services to state-sanctioned marijuana businesses.⁴⁷ Under the current structure, the guidance issued by FinCEN and the DOJ offers no substantial protections against the prohibitions of the BSA or marijuana enforcement under the CSA.⁴⁸ Instead, the guidance only provides a “deprioritization” of prosecutions relating to the provision of financial services to state-sanctioned marijuana businesses so long as the financial entities conform to the outlined procedures.⁴⁹ Without more substantial protections, banks that comply with the guidance may still be found in violation of money laundering statutes and may be prosecuted by the DOJ.⁵⁰ In effect, a bank that attempts to invoke the FinCEN guidance may find immunity from prosecution excluded from its “negotiations,” or “agreement” with FinCEN and that the guidance operates as “guidelines” rather than rules that shield banks from penalties.

The penalties facing banks include those contained in money laundering statutes. The “relevant provision of the Money Laundering Control Act reads,

[w]hoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
(A) (i) with the intent to promote the carrying on of specified unlawful activity. . . shall be sentenced to a

46. *Id.*

47. Editorial, *Feds Drag Feet on Banking Access for Marijuana Industry*, SEATTLE TIMES, Aug. 26, 2014, at A9.

48. See Cole Memo, *supra* note 15, at 2 (explaining that it is the customary practice of the DOJ to leave localized enforcement to local authorities when activity does not violate one of the stated priorities, but does not directly state that it will not exercise its prerogative to prosecute); see also FINCEN GUIDANCE, *supra* note 9 at 2 (stating only that FinCEN should “consider these enforcement priorities with respect to federal money laundering, unlicensed money transmitter, and BSA offenses predicated on marijuana-related violations of the CSA”).

49. Cole Memo, *supra* note 15, at 2.

50. *Id.*

fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.⁵¹

At the federal level, proceeds from marijuana businesses still represent “proceeds of some form of unlawful activity.”⁵² Simply put, income generated by state-sanctioned marijuana businesses is, in the eyes of the federal government, ill-gotten gains.⁵³ Such income and profits derived from businesses generating it are subject to the penalties of 18 U.S.C. §§ 1956 and 1957, which forbid “[e]ngaging in monetary transactions in property derived from specified unlawful activity.”⁵⁴

The FinCEN guidance and the Cole Memo, issued to allow banks some freedom to deal specifically with businesses legalized under state law, did not remove this danger.⁵⁵ Rather, the Cole Memo outlines a list of priorities for prosecution of marijuana-related crimes and instructs DOJ attorneys and law enforcement, that whether marijuana-related conduct violates one of these priorities should be instructive when considering prosecution.⁵⁶

The Cole Memo priorities include:

- (1) Preventing the distribution of marijuana to minors;
- (2) Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- (3) Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- (4) Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- (5) Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- (6) Preventing drugged driving and the exacerbation of other adverse

51. Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1352(a)(1), 100 Stat. 3207, 3207-18 (codified as amended at 18 U.S.C.A. § 1956(a)(1) (West 2013)).

52. *Id.*

53. Controlled Substances Act, 21 U.S.C. § 841(b)(1)(A) (2012).

54. 18 U.S.C.A. § 1957.

55. Cole Memo, *supra* note 15, at 2.

56. *Id.*

public health consequences associated with marijuana use; (7) Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and (8) Preventing marijuana possession or use on federal property.⁵⁷

Essentially, the guidance only provides that if the Cole Memo Priorities are not implicated in the course of a financial institution's activities relating to a marijuana business, "prosecution may not be 'appropriate.'" ⁵⁸ This language is far too tepid to offer banks any assurance that they will evade federal criminal prosecution if they provide financial services to a marijuana business.⁵⁹ The guidance also fails to provide any incentive to offer basic financial services to marijuana businesses.⁶⁰ The FinCEN guidance, predicated on the Cole Memo, offers neither a firm guarantee of protection from prosecution nor a firm prohibition against federal retribution.⁶¹ The Cole Memo and the FinCEN guidance state that, although the DOJ and FinCEN do not wish to use their discretion to allocate their resources to the prosecution of banks serving businesses that are considered legal in their state, it does not prevent them from doing so.⁶² In accordance with this weak assurance, most banks have erred on the side of caution and refused to offer services to marijuana businesses.⁶³

Some smaller banks have voluntarily established relationships with state-sanctioned marijuana businesses, but the rate at which these relationships terminate appears to overshadow any such progress.⁶⁴ The

57. *Id.*

58. Kovaleski, *supra* note 37.

59. *Id.*; see also Editorial, *supra* note 47 (statement of Don Childears, president of the Colorado Bankers Association) ("After a series of red lights, we expected this guidance to be a yellow one. This isn't close to that.").

60. *Id.*

61. See Nelson, *supra* note 41 (quoting the American Bankers Association) ("Because marijuana is illegal under federal statute, guidance alone isn't enough. There's a great deal of guidance that banks would want to see in terms of banking with these types of businesses but guidance alone doesn't change the fundamental prohibition.").

62. Cole Memo, *supra* note 15, at 2.

63. Stephens, *supra* note 11. (" 'The media was saying it was a green light,' said Jenifer Waller, a Colorado Bankers Association senior vice president. 'We said, "No, it continues to be a very solid red light; not even yellow, to be honest." ' '").

64. See Bruce Krasnow, *New Banking Rules Create Tough Barriers for State's Growing Medical Pot Businesses*, INSURANCENEWS.NET (Oct. 19, 2014),

willingness of smaller depository institutions to bear the risk presented by the possibility of federal prosecution causes headaches for the larger institutions that are not offering their services to marijuana businesses.⁶⁵ For example, the entanglement of funds traceable to sources within the state-sanctioned marijuana industry as they move from smaller banks to larger banks creates concerns for the larger banks that have been, on the whole, unwilling to engage with this growing industry.⁶⁶

Significantly, of the financial institutions that have elected to provide services to marijuana-related businesses, none have yet been subjected to any enforcement actions.⁶⁷ As of August 12, 2014, however, only 105 U.S. financial institutions provided banking services to state-sanctioned marijuana businesses.⁶⁸ These 105 financial institutions represent less than 1% of all banks and credit unions in the United States.⁶⁹ Despite the relative dearth of participation, FinCEN maintains that the agency's guidance accomplishes its purported aims by "facilitating access to financial services, while ensuring that this activity is transparent and the funds are going into regulated financial institutions."⁷⁰ Whatever FinCEN's position, the widespread reluctance of banks indicates that the industry does not share the sentiment that the guidance is "facilitating access to financial services."

IV. SUSPICIOUS, SUSPICIOUS ACTIVITY REPORTS

The FinCEN guidance provides a regulatory structure for banks that do choose to establish business relationships with marijuana

<http://insurancenewsnet.com/oarticle/2014/10/18/new-banking-rules-create-tough-barriers-for-states-growing-medical-pot-business-a-569267.html#.VNYNjIupX8E> (quoting Brian Kindle) ("[S]everal months later, the effect of that guidance remains hazy. Comments by FinCEN Director Jennifer Shasky Calvery indicate that while a small handful of institutions are providing services to the legal marijuana industry, many others have terminated relationships with customers tied to the marijuana trade.").

65. Wolf, *supra* note 40.

66. *Id.*

67. Or, at least, Jennifer Shasky Calvery, FinCEN Director, "was unaware" of any such prosecutions. Kovaleski, *supra* note 37.

68. Jennifer Shasky Calvery, Director, Fin. Crimes Enforcement Network, Remarks to Mid-Atlantic AML Conference (Aug. 12, 2014) (transcript available at http://www.fincen.gov/news_room/speech/html/20140812.html).

69. Editorial, *Marijuana Dispensaries Need Access to Banking System*, BOSTON GLOBE, Sept. 9, 2014, at A12.

70. Calvery, Remarks to Mid-Atlantic AML Conference, *supra* note 68.

businesses.⁷¹ If the deprioritization of federal prosecution does not deter banks from offering their services, they may be dissuaded by the regulatory structure itself. The structure included in the FinCEN guidance enumerates processes related to “customer due diligence” and the issuing of “Suspicious Activity Reports” (“SARs”).⁷² These processes place major burdens on banks in addition to the already disconcerting lack of assurance against prosecution.⁷³

The FinCEN guidance requires that all banks first conduct “customer due diligence” before entering into any specific business relationship with a marijuana vendor. “Due diligence” includes:

- (i) verifying with the appropriate state authorities whether the business is duly licensed and registered; (ii) reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business; (iii) requesting from state licensing and enforcement authorities available information about the business and related parties; (iv) developing an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served (e.g., medical versus recreational customers); (v) ongoing monitoring of publicly available sources for adverse information about the business and related parties; (vi) ongoing monitoring for suspicious activity, including for any of the red flags described in this guidance; and (vii) refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk.⁷⁴

FinCEN then asks banks to continue to monitor these clients and to use their judgment as to whether or not a client has violated one of the “Cole Memo Priorities.”⁷⁵

71. FINCEN GUIDANCE, *supra* note 9 at 2.

72. *Id.*

73. Hill, *supra* note 23, at 15–16.

74. FINCEN GUIDANCE, *supra* note 9 at 2.

75. *Id.*; *see also supra* Part III.

After moving through the process of “customer due diligence” and choosing to accept a customer account from a state-sanctioned marijuana business, a bank must then follow a process of filing SARs that applies regardless of the client’s compliance with the Cole Memo Priorities.⁷⁶ “The obligation to file a SAR is unaffected by any state law that legalizes marijuana-related activity.”⁷⁷ A financial institution is required to file a SAR if, consistent with FinCEN regulations, the financial institution “knows, suspects, or has reason to suspect” that any transaction involves proceeds from activity that the federal government designates as illegal, attempts to avoid liability by misrepresenting the source of such funds, is “designed to evade” BSA regulations or “lacks a business or apparent lawful purpose.”⁷⁸

The FinCEN regulatory scheme and federal law still treat marijuana-related activity as an illegal source of funds.⁷⁹ Therefore, any financial institution beginning a relationship with a marijuana-related business must immediately file a “Marijuana Limited Suspicious Activity Report,” even if the relationship implicates none of the Cole Memo Priorities and the marijuana-related business has undergone the scrutiny of customer due diligence.⁸⁰ These Marijuana Limited SARs identify the parties involved and state that the “filing institution is filing the [Marijuana Limited Suspicious Activity Report] solely because the subject is engaged in a marijuana-related business.”⁸¹ These Marijuana Limited SARs also require a bank’s assurance that “no additional suspicious activity has been identified,” beyond the fact that marijuana is involved.⁸²

After the initial SAR, FinCEN requires banks to file “continuing activity reports.”⁸³ These reports, in addition to the information contained in the Marijuana Limited SARs, contain the amounts of deposits, withdrawals and transfers made by the account since the last SAR filing.⁸⁴ The filing of “continuing activity reports” is an obligation

76. FINCEN GUIDANCE, *supra* note 9 at 3..

77. *Id.*

78. *Id.*

79. *Id.*; *see, e.g.*, Bank Secrecy Act, 31 U.S.C. § 5318(g) (2012).

80. FINCEN GUIDANCE, *supra* note 9 at 4.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

of ongoing “customer due diligence.”⁸⁵ A “continuing activity report” must be filed within 120 days of the initial filing, and continue under that same timeframe.⁸⁶ This will result in three “continuing activity report[s]” in a twelve-month period.⁸⁷

Conducting customer due diligence requires continued monitoring for “red flags.”⁸⁸ The February FinCEN Guidance includes a non-exhaustive list of actions constituting “red flags.”⁸⁹ If, in the course of conducting customer due diligence, an institution detects a possible violation of one of the Cole Memo Priorities, the institution must file a “Marijuana Priority” SAR.⁹⁰ A SAR of this kind must contain “comprehensive detail.”⁹¹ The FinCEN Guidance notes the following as relevant details to law enforcement includable in a “Marijuana Priority” SAR: the identifying information and addresses of the subject and “related parties, details and descriptions” of those policies which the financial institution suspects have violated, and dates, amounts and “other relevant details” of the financial transactions.⁹² Finally, if a bank wishes to terminate a relationship with a marijuana-related business, it must file a “Marijuana Termination SAR” to indicate that it has done so in order to remain compliant with the relevant regulatory statutes.⁹³

Thus, if a depository institution wishes to enter into a relationship with a legitimate marijuana-related business, it must perform extensive background checks into the proposed client.⁹⁴ The institution must closely monitor the client’s activity on a continuing basis while continually filing SARs concerning the business’ financial

85. *Id.*

86. *Frequently Asked Questions Regarding the FinCEN Suspicious Activity Report*, FIN. CRIMES ENFORCEMENT NETWORK, http://www.fincen.gov/whatsnew/html/sar_faqs.html (question #16) (providing guidance on the filing timeframe for submitting a continuing activity report).

87. *Id.*

88. FINCEN GUIDANCE, *supra* note 9, at 5.

89. For example, “[t]he business is unable to demonstrate that its revenue is derived exclusively from the sale of marijuana in compliance with state law, as opposed to revenue derived from (i) the sale of other illicit drugs, (ii) the sale of marijuana not in compliance with state law, or (iii) other illegal activity.” *Id.*

90. FINCEN GUIDANCE, *supra* note 9, at 4.

91. *Id.*

92. *Id.*

93. *Id.* at 4–5.

94. *Id.* at 2.

transactions.⁹⁵ The SARs must also include what those transactions may indicate.⁹⁶ If any indication comes to the bank's attention that might suggest the violation of a prosecutorial priority, the bank must immediately terminate its relationship with that client.⁹⁷ A misstep in any part of this process could incur significant penalties, including exposing the bank to the possibility of prosecution.⁹⁸ Clearly, this extensive burden would not appeal to a financial institution.

The SAR process is also full of bureaucratic redundancies. If the SAR process, as implemented, actually means to deter banks from supporting businesses that implicate one of the enumerated prosecutorial priorities, the initial SAR filing is not essential to that end. If banks are charged with the ongoing monitoring and customer "due diligence," and are required to notify the government at the first sign of possible infraction, the initial filing appears to serve no other purpose than to keep a registry for possible prosecution should FinCEN decide that it wishes to change its stance on deprioritization. The effect of the current system has chilled banking of marijuana businesses, because the federal government still views this activity as criminal.⁹⁹ Even without actions violative of the emphasized prosecutorial priorities issued by FinCEN, the guidance implies that banks' relationships with these businesses are "suspicious" by nature.¹⁰⁰ The banks, in turn, have responded by becoming "suspicious" of their ability to extend services to these businesses unencumbered by the possibility of imminent prosecution.¹⁰¹

Furthermore, the onerous requirements for continued monitoring and filing of the baseline SARs are unnecessary in light of the provisions for "red flag" conduct. If the marijuana-related business raises an issue that appears relevant to the prosecutorial priorities that FinCEN has emphasized, then a report must be filed.¹⁰² However, a constant stream of monitoring in the absence of such "red flags" is

95. *Id.* at 4.

96. *Id.*

97. *Id.* at 5.

98. *Id.* at 2.

99. *See* Nelson, *supra* note 41.

100. FINCEN GUIDANCE, *supra* note 9 at 3.

101. *See* Stephens, *supra* note 11.

102. *Id.*

burdensome.¹⁰³ Requiring banks to follow such ponderous procedures does not more efficiently detect marijuana-related businesses that do implicate the Cole Memo Priorities. Additionally, requiring these procedures does not increase the probability of detecting marijuana-related businesses that run afoul of the priorities that the government has a particularized interest in protecting. If the initial SAR and the continued submission of “Marijuana Limited” SARs were removed from the monitoring scheme and the “Marijuana Priority” and “Marijuana Termination” SARs remained, it might provide banks with more flexibility to enter into these relationships. If the regulatory scheme could be streamlined, it would not deprive the government of its right to prosecute those businesses operating outside of legitimate boundaries.¹⁰⁴ Customer due diligence would, of course, still be required, but at a more manageable, less arbitrary level. The inclusion of these other procedures sets such a high regulatory bar that banks are sharply deterred from participating in relationships with marijuana businesses.¹⁰⁵

Regulators and lawmakers must afford stronger protections to banks in providing services to the marijuana industry, or the SAR process must be severely truncated, or both. Without either of these reforms, banks will continue to feel that they are being shortlisted for prosecution by providing lists of “adverse” clients beyond the normal financial regulatory protocols.¹⁰⁶ Ultimately, legislation may be the only firm solution to the trepidation that financial institutions feel in dealing with marijuana businesses.¹⁰⁷ In the meantime, the softening of the regulatory protocols contained in the FinCEN guidance could ease some of the banks’ anxieties, but such protocol changes are still subject

103. Brown et al., *supra* note 7.

104. See Hill, *supra* note 23, at 18 (quoting FED. FIN. INST. EXAMINATION COUNCIL, BANK SECRECY ACT/ANTI-MONEY LAUNDERING EXAMINATION MANUAL 9, 63–65 (2010) (“For example, a person, including a bank employee, willfully violating the [BSA] or its implementing regulations is subject to a criminal fine of up to \$250,000 or five years, or both.”)).

105. See Hill, *supra* note 23, at 46 (“[F]ederal financial regulators must set achievable due diligence expectations for banks offering services to the marijuana industry. If federal regulators unreasonably require financial institutions to police marijuana businesses’ compliance with all federal and state law, institutions will continue to avoid the marijuana industry.”).

106. Stephens, *supra* note 11.

107. Nelson, *supra* note 41.

to the possibility of quick turnover.¹⁰⁸ This Note does not claim that there are no legitimate reasons for banks to provide information in cases where a reasonable cause for concern arises. Instead, it advocates for a compromise between sweeping permissiveness and cumbersome limitations that brand any such relationships as *prima facie* “suspicious” in nature.

Even if additional protections and reduced SAR reporting materialize, larger financial institutions will likely still remain unconvinced to open their doors to marijuana businesses.¹⁰⁹ The American Bankers Association (the “Association”), for example, has said that the problems inherent in the fundamental prohibition cannot be ameliorated by guidance alone.¹¹⁰ The Association did indicate that further and friendlier guidance might help to change the positions of banks, but that guidance remains subject to immediate change and, thus, cannot provide lasting assurance.¹¹¹ While regulatory changes might provide some basis for movement on the issue, the only way that banks will feel completely shielded from the possibility of imminent prosecution is by a substantive change in the law.¹¹²

Nonetheless, some modifications could ease the transition from total prohibition to the opening up of a burgeoning commercial market. As Congress inches toward aligning itself with the majority of Americans who support legalization of marijuana, there are several proposals under legislative consideration.¹¹³ Coupled with an enervation of the stringency of the protocols outlined by FinCEN to remain consonant with the BSA and the relevant money laundering statutes, we could see a change in the hardline attitude the major banks have so far adopted toward conducting business with the marijuana industry. Legislative change is the Holy Grail for financial institutions to feel secure enough to offer services to the marijuana industry.¹¹⁴ Until then, a softening of the FinCEN guidance could move

108. *Id.*

109. *See id.* (quoting Grossman, *supra* note 109).

110. *Id.*

111. *Id.*

112. *Id.*

113. *See* Marijuana Businesses Access to Banking Act of 2013, H.R. 2652, 113th Cong. (2013); Financial Services and General Appropriations Act of 2015, H.R. 5016, H.Amdt. 1086, 113th Cong. (2014); *see also infra* Part IV.

114. *See* Nelson, *supra* note 41 (quoting Grossman, *supra* note 109).

significantly in that direction.¹¹⁵

V. CRIMINALS PREFER CASH, BUT MAY ACCEPT CREDIT UNIONS

Without access to depository institutions and banking services, the marijuana industry is largely an all-cash business.¹¹⁶ All-cash income streams inevitably attract criminal activity, make state and federal tax enforcement difficult, and leave revenue and commodities produced by the industry outside of the larger marketplace where they could serve to foster economic viability on a greater scale.¹¹⁷ Though the businesses themselves operate legally at the state level, the unavailability of financial services forces many manufacturers and business owners to provide security for their own profits.¹¹⁸ Their cash is often stored in warehouses, in private residences, or on the business' premises where it is secured only by conventional means available to the general public.¹¹⁹ A lack of access to the security of depository institutions forces some state-approved marijuana businesses to hire private security firms and to charter armored trucks to transport the large amounts of cash accrued by their operations.¹²⁰ With cash on hand, and limited options available for its secure storage, state-approved marijuana businesses are left vulnerable to theft, extortion, harassment, and substantially increased overhead.¹²¹ A lack of access to depository institutions also keeps the cash generated by marijuana-related activities from working as a more lucrative investment vehicle and makes accurate collection of tax more difficult.¹²²

In the absence of large-scale commercial financial services, some states that have legalized marijuana-related businesses have

115. *See id.*

116. Stephens, *supra* note 11.

117. Ferner, *supra* note 29.

118. Stephens, *supra* note 11.

119. *Id.*

120. *Id.*

121. *See id.* (illustrating the difficulties of a particular business owner, Elliot Klug, "One upshot: Cash remains king for Klug's business, a situation that heightens the risk level. He said one bank has approached him about providing services, but insisted that only armored cars could transport his cash and his products and that wouldn't be covered by the proposed \$1,500 monthly service fee.").

122. *See* Jacob Sullum, *Marijuana Money Is Still a Pot of Trouble for Banks*, FORBES (Sept. 18, 2014), <http://www.forbes.com/sites/jacobsullum/2014/09/18/local-banks-terrified-by-friendly-neighborhood-marijuana-merchants/>.

proposed state legislation that permits the use of financial cooperatives.¹²³ These would essentially function as credit unions.¹²⁴ But even these measures are fraught with complications. One major complication is that the Federal Reserve would have to permit such financial cooperatives to accept credit cards and checks.¹²⁵

Under the Marijuana Financial Services Cooperatives Act (“Co-op Act”) passed May 7, 2014, by the Colorado Senate, the financial cooperatives would operate in a manner similar to credit unions.¹²⁶ The co-ops, however, would not have a deposit insurance requirement and would be governed by the state’s financial services commissioner.¹²⁷ The financial cooperatives will be run by the co-op members and supervised by the state.¹²⁸ While improving upon mass hoarding and transporting of physical cash, without the security offered by deposit insurance, such cooperatives might find themselves in the crosshairs of instability. Deposit insurance protects depositors in the event of a bank’s failure.¹²⁹ If the co-op were to fail, members’ deposits would not be protected in the same way.¹³⁰ Without the safety net of deposit insurance, the “cannabis co-ops” mitigate only some of the problems associated with the “all-cash” nature of the current marijuana industry.¹³¹

There are restrictions in place, peculiar to these so-called “cannabis co-ops” under the Co-op Act, that do little to mitigate the problems experienced by marijuana businesses in attaining financial services.¹³² First, incorporators of the co-ops, under the Colorado legislation, must provide the state financial services commissioner with

123. Coffman, *supra* note 16.

124. *Id.*

125. Stephens, *supra* note 11.

126. Coffman, *supra* note 16.

127. *Id.*

128. *Id.*

129. *FDIC Mission, Vision and Values*, FED. DEPOSIT INS. CORP., <https://www.fdic.gov/about/mission/> (last visited Jan. 6, 2015).

130. At least, not with the substantial guarantees of the FDIC or NCUA. They might seek private insurance, but it would not fall under the purview of the national government.

131. See Coffman, *supra* note 16.

132. Marijuana Financial Services Cooperatives Act, H.R. 14-1398 § 11-33-104(4)(a), 69th Leg. (Co. 2014) (“Before the commencement of operations or the conduct of business by the co-op, the incorporators of the co-op must provide to the commissioner written evidence of approval by the federal reserve system board of governors for access by the co-op to the federal reserve system in connection with the proposed depository activities of the co-op.”).

written evidence of approval by the Federal Reserve Bank for access to the Federal Reserve System.¹³³ Second, the bill states that, while subjected to taxation and outside of the protection of the FDIC, the “cannabis co-op” must “comply with all applicable requirements of federal law,” “file suspicious activity reports,” “conduct due diligence,” and “establish a customer identification policy.”¹³⁴ In other words, the procedures, restrictions and flimsy protections offered by the FinCEN guidance apply with equal vigor to these “co-ops” despite the lack of an insurance benefit. Additionally, these co-ops are designated specifically to provide services to businesses that the federal government views as adverse clients supplying ill-gotten gains.¹³⁵ If the political winds were to shift, these co-ops could be targets for prosecution and penalties. The so-called “cannabis credit co-op” must first apply to submit to the purview of the Federal Reserve System.¹³⁶ Then the co-op must remain restricted by the very procedures that deter the banks from conducting the business they seek to conduct. Finally, co-ops must do all of this without many of the benefits offered by the infrastructure of a conventional depository institution.

The powers of these co-ops are briefly outlined as follows: (1) to make loans to its members and other co-ops; (2) to make deposits in other state or national financial institutions that voluntarily accepts those deposits; (3) to invest in obligations or securities guaranteed or insured by an agency of the United States, obligations of any state or territory of the United States, in shares of mutual funds or investment companies, stocks, bonds or other securities; (4) to acquire, through purchase or other lawful transactions, and hold the title to real and personal property; (5) to exercise such incidental powers as are necessary to enable it to carry on effectively the business for which it is incorporated; (6) to sell its own assets and purchase the assets of another co-op; and (7) to participate with other co-ops or financial organizations in making loans to co-op members.¹³⁷

On its face, the notion of a cannabis co-op sounds like precisely the system that the state-sanctioned marijuana industry needs. It is a

133. *Id.*

134. *Id.* § 11-33-126.

135. *See* Controlled Substances Act, 21 U.S.C. § 841(a)(1) (2012) (categorizing marijuana as illegal under federal law).

136. H.R. 14-1398, § 11-33-104(4)(a).

137. *Id.* § 11-33-107.

starting point, but these powers are without much force on their own because the deposits made in other state or national financial institutions must be “voluntarily accept[ed].”¹³⁸ Investments in shares of mutual funds or investment companies face essentially the same complication.¹³⁹ Rather than circumventing the existing problems with the regulatory structure, the co-op schema merely redoubles them under a new, more specific banner.¹⁴⁰ In order to participate in the larger financial markets, these co-ops would have to place their funds in the care of institutions that are unwilling to expose themselves to the liabilities associated with ill-gotten gains. While the benefits associated with access to loans, the facilitation of real property transactions and the diversion of physical cash into limited credit availability will likely alleviate some of the strain, the channeling of the proceeds of marijuana businesses into real economic contribution to the markets is not satisfied by these types of institutions. Without insurance or infrastructure, the criminal depletion of funds from co-ops or the potential for isolated panics are still very real concerns.

Most of the powers granted to these new financial entities by the Co-op Act ring hollow and exacerbate a problem that the banks are facing in dealing with smaller financial institutions that have accepted funds from marijuana businesses.¹⁴¹ Specifically, larger financial institutions are uncertain of their risk of liability in accepting funds from smaller depository institutions,¹⁴² which would presumably include “cannabis credit co-ops” that deal with the marijuana vendors directly. For example, “if a marijuana business deposits money into an account at a bank which then wires funds to pay for supplies such as soil, seeds, or packaging, the banks handling the other side of the transactions need to know if they risk charges for lapses in their anti-money laundering programs, or even criminal money laundering.”¹⁴³

The FinCEN guidance issued in February is conspicuously unclear as to how to handle indirect activity.¹⁴⁴ The guidance mentions that the institutions “may file” a report with authorities and should make

138. *Id.* § 11-33-107(1)(d).

139. *Id.* § 11-33-107(1)(e)(III).

140. *Id.*

141. The problem of handling indirectly linked accounts. Wolf, *supra* note 40.

142. *Id.*

143. *Id.*

144. *Id.*

“risk-based” decisions in determining whether or not to process such transactions.¹⁴⁵ Such language likely indicates that banks will continue to avoid direct transactions with marijuana-related businesses as well as indirect transactions with customers who are depositing money they received from marijuana-related activity.¹⁴⁶ The lack of clarity concerning the problem of indirect banking relationships with marijuana businesses presents not only further doubts as to the major institutions’ willingness to involve themselves but also to the extent of the efficacy of institutions such as the Colorado “cannabis credit co-ops.” At present, it is likely that such institutions’ powers will remain severely limited. From the information available in the bill, it appears they will be unable to accomplish much more than a diversion of cash into truncated credit, housed by what are functionally credit unions subject to the same federal guidelines as banks, but without the benefit of deposit insurance.¹⁴⁷ Without more substantial reforms, any participation in the larger financial system—despite what the Colorado legislation grants as “powers” to these co-ops—will be mostly titular.

VI. THE GRASS IS ALWAYS GREENER ON THE OTHER SIDE OF THE BELTWAY

Amidst this gloomy forecast regarding the participation of marijuana-related businesses in the financial system, there are some legislative proposals currently under discussion. First is the Marijuana Businesses Access to Banking Act of 2013, which would create the blanket immunity that banking institutions are clamoring for to allow them the security they need to conduct business with marijuana-related enterprises.¹⁴⁸ Second is the proposed Financial Services and General Appropriations Act of 2015, which contains an amendment (the “Heck Amendment”) that would “prohibit use of funds with respect to [states with legalized marijuana], to penalize a financial institution solely because the institution provides financial services to an entity that is a manufacturer, producer, or a person that participates in any business or

145. *Id.*; see also FINCEN GUIDANCE, *supra* note 9.

146. Wolf, *supra* note 40.

147. Marijuana Financial Services Cooperatives Act, H.R. 14-1398 §§ 11-33-107, 11-33-126, 69th Leg. (Co. 2014).

148. Marijuana Businesses Access to Banking Act of 2013, H.R. 2652, 113th Cong. (2013) (as introduced June 10, 2013).

organized activity that involves handling marijuana or marijuana products.”¹⁴⁹ The former has yet to move through committee or to see the House floor.¹⁵⁰ The latter passed the House and awaits Senate approval.¹⁵¹ Finally, a bill was recently passed by both chambers of Congress and signed by the President that severely limited the DOJ’s power to prosecute state-sanctioned medical marijuana businesses, but did little to address the complications involving the banks.¹⁵²

One of the relevant provisions of the Marijuana Businesses Access to Banking Act prohibits a federal banking regulator from terminating or limiting the deposit insurance of a bank solely because the institution provides financial services to a state-sanctioned marijuana business.¹⁵³ The Act also forbids federal regulators from prohibiting, penalizing, or otherwise discouraging a depository institution from providing services to a legitimate marijuana-related business.¹⁵⁴ Finally, the proposed bill prohibits regulators from recommending, incentivizing or encouraging a bank or depository institution to cancel or diminish the services offered to an individual solely because the individual is a proprietor, manufacturer or producer involved in a marijuana-related state-sanctioned business.¹⁵⁵ Although this bill provides precisely the kind of protections and guarantees against civil and criminal liability the banking industry is demanding before it is willing to engage meaningfully with the budding marijuana market, it is unlikely to reach the President’s desk.¹⁵⁶ The bill is over a year old and has yet to make it through committee.¹⁵⁷

More promising than the Marijuana Business Access to Banking Act is the appropriations bill that has already passed the House of

149. Financial Services and General Appropriations Act of 2015, H.R. 5016, H.Amdt. 1086, 113th Cong. (2014).

150. *H.R. 2652 (113th): Marijuana Businesses Access to Banking Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr2652> (last visited Oct. 5, 2014).

151. H.R. 2652.

152. Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217.

153. H.R. 2652.

154. *Id.*

155. *Id.*

156. GovTrack.us considers the bill to be dead. Previously, it gave the bill a 1% chance of passage. GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr2652> (last visited Jan. 6, 2015).

157. *Id.*

Representatives with the Heck Amendment.¹⁵⁸ The Heck Amendment denies the allocation of funds to the Treasury Department for the purpose of penalizing financial institutions for dealing with state-sanctioned marijuana businesses.¹⁵⁹ While falling well short of instituting any specific legal protections that would contradict the “dual regime” structure of federal prohibition and state permission of the sale of marijuana, it carries with it the implication of accomplishing a form of protection *de facto* from federal penalties.¹⁶⁰ Although the appropriations bill does not prevent prosecution pursuant to the CSA by the DOJ, it does limit the power of FinCEN and the Treasury Department to pursue violations of the BSA and relevant federal money laundering statutes.¹⁶¹ The discretion of these agencies to pursue these violations is much broader and more meaningful without the limitations on their funding imposed by the Heck Amendment.¹⁶² BSA violations are, in large part, the area of greatest concern expressed by the banking industry after the issuance of the February Guidance.¹⁶³

If the appropriations bill is ultimately signed into law, retaining the Heck Amendment in its current form, many of the questions raised by the banking industry will have some more solid and favorable answers. Obviously, the banking industry would prefer to see something more akin to the full-scale immunity offered in the Marijuana Businesses Access to Banking Act, but, in its absence, the prohibition of a release of funds to pursue prosecutions by FinCEN could result in a shift in the banks’ attitudes. Unfortunately, at the close of the 113th Congress, neither the appropriations bill containing the Heck Amendment, nor the Marijuana Access to Banking Act reached the Senate, and at this point, appear to be ostensibly dead.¹⁶⁴

Congress did pass a spending bill containing a provision

158. Financial Services and General Appropriations Act of 2015, H.R. 5016, H.Amdt. 1086, 113th Cong. (2014).

159. *Id.*

160. Mr. Heck explains, “I offer this bipartisan amendment to carry forth an important issue of public safety to provide legally-constituted marijuana businesses access to banking services. To do otherwise is to render them an all-cash sector of the economy, which is fraught with peril.” *Id.*

161. *See id.*

162. *Id.*

163. Brown et al., *supra* note 7.

164. GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr5016> (last visited Jan. 6, 2015).

addressing marijuana prohibition, but it does not offer any substantive clarification concerning the access to depository institutions by the industry.¹⁶⁵ The Consolidated and Further Continuing Appropriations Act of 2015, nicknamed the CRomnibus Act (a combination of continuing resolution and omnibus spending bill) was signed into law on December 16, 2014.¹⁶⁶ CRomnibus prohibits the allocation of funds to the DOJ for the purpose of prosecuting medical marijuana businesses in states where it has been legalized.¹⁶⁷ However, CRomnibus makes no mention of marijuana legalized for recreational purposes, nor does it contain any language specifically concerning financial crimes or banking institutions.¹⁶⁸ Where the Heck Amendment specifically prohibited actions by FinCEN against banking institutions, CRomnibus addresses the DOJ and prosecutions contradicting state law.¹⁶⁹ It remains to be seen if CRomnibus will be interpreted to prevent prosecution of banking institutions that deal with medical marijuana businesses. Even in such a scenario, CRomnibus will still have no effect on the operations of the Treasury Department or FinCEN. It will also need to be determined, by regulation or by the interpretation of the courts, whether legal recreational marijuana businesses will also benefit from the appropriations restrictions.¹⁷⁰ Given the lack of direct language, clarity will need to be established as the law is tested.¹⁷¹

While this outcome may be good news for marijuana-related business owners who fear federal prosecution under the CSA, it does little to address the concerns of the banking industry. There is a possibility that CRomnibus could prevent the DOJ from prosecuting banks under the CSA, but the BSA and anti-money laundering statutes enforceable by the Treasury Department and the FinCEN remain unrestricted.¹⁷²

Regardless of how any of the relevant legislation unfolds, additional procedural and regulatory changes to the SAR and customer

165. Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. The text of the bill makes no direct mention of recreational marijuana; its language is confined to state-sanctioned “medical” marijuana. *See id.*

171. *See id.*

172. *Id.*

due diligence procedures outlined by the FinCEN would also be necessary.¹⁷³ For instance, limiting the SAR process so that it is less cumbersome, and providing more robust language in guidelines issued by the DOJ and FinCEN could grant greater assurance to financial institutions that they will not be prosecuted simply for doing business with the marijuana industry, provided that there is not some further violation under the CSA. However, changes to regulatory guidance cannot possibly account for political shifts that could leave the banking industry vulnerable again.¹⁷⁴ Therefore, changes in federal guidance are only short-term fixes to be used in the absence of new legislation or until pending legislation is passed.¹⁷⁵ The CROmnibus bill does not address the core concerns of the banking industry, concerns that the Heck Amendment might have alleviated.¹⁷⁶ Likewise, even the Heck Amendment only grappled with the purse strings of federal agencies, and not the underlying problem of a fundamental conflict between state and federal law.¹⁷⁷

Statutory protections may open the floodgates allowing access to financial services. However, neither the Heck Amendment, the CROmnibus bill, nor the Marijuana Businesses Access to Banking Act will be sufficient to curtail the problems inherent in a “dual regime” system wherein all marijuana businesses are violative of federal law even where the conduct has been legalized in the state.¹⁷⁸ The legislative changes may also fall short of alleviating the concerns banks still may have about engaging in behavior that violates federal law.¹⁷⁹ Until Congress is willing to address the legalization of marijuana, the practical reality is that many businesses, sanctioned by state law, lack access to financial services to avoid exacerbating the problems of a black market.¹⁸⁰ The federal government’s choice to place a “low

173. See *supra* Part III.

174. Nelson, *supra* note 41 (quoting Grossman, *supra* note 109).

175. *Id.*

176. 128 Stat. at 2217; Marijuana Businesses Access to Banking Act of 2013, H.R. 2652, 113th Cong. (2013) (as introduced Jun. 10, 2013).

177. Financial Services and General Appropriations Act of 2015, H.R. 5016, H.Amdt. 1086, 113th Cong. (2014).

178. Hill, *supra* note 23, at 6.

179. Nelson, *supra* note 41.

180. Kevin Wack, *Banks ‘Loosen Up’ on Pot Business as FDIC Adopts FinCEN Guidance*, AM. BANKER, Oct. 28, 2014, at 2 (quoting James Pishue, president of Washington Bankers Association, as saying, “[t]here really needs to be a federal solution to this.”).

priority” status on prosecuting banking institutions that deal with the state-sanctioned marijuana industry is given more meaning when the purse strings are tightly closed as well. Beyond these specific proposals, the larger legal problem with the “dual regime” may only be finally resolved if marijuana is decriminalized at the federal level, or if marijuana is decriminalized at the federal level in states that have legalized marijuana.¹⁸¹ Without such a sea change, the legal landscape will remain fraught with contradictions and the security of financial institutions that choose to participate “at their own risk,” is dependent upon the practical realities of underenforcement of federal law.¹⁸²

Regulatory changes, rather than the mere issuance of tepid “guidance” would also signal greater protections to banks that seek to engage with the marijuana industry.¹⁸³ A shift in funding, similar to that offered by the Heck Amendment could prove to be enough of a tourniquet to produce an elevation of participation, or it could prove to be as lackluster of a solution as the FinCEN guidance has proven to be. In the current environment of uncertainty, it will remain to be seen whether banks’ eagerness to participate in an increasingly lucrative market will outweigh their desire to avoid liability.

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181. See Hill, *supra* note 23, at 44.

182. Wack, *supra* note 175.

183. Nelson, *supra* note 41.